

The Honorable Thomas S. Zilly

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT SEATTLE

HARMONY GOLD U.S.A., INC.,

Plaintiff,

v.

HAREBRAINED SCHEMES LLC,  
HAREBRAINED HOLDINGS, INC., JORDAN  
WEISMAN, PIRANHA GAMES INC.,  
INMEDIARES PRODUCTIONS, LLC, and  
DOES 1-10,

Defendants.

No. 2:17-cv-00327-TSZ

HAREBRAINED DEFENDANTS'  
REPLY IN SUPPORT OF  
DEFENDANT PIRANHA GAMES,  
INC.'S MOTION FOR SUMMARY  
JUDGMENT (DKT. 47)

Defendants Harebrained Schemes LLC, Harebrained Holdings Inc., and Jordan Weisman (collectively, the "Harebrained Defendants") previously joined in Defendant Piranha Games, Inc.'s Motion for Summary Judgment (Dkt. 47). In opposition to that Motion, Harmony Gold abruptly changed its theory of infringement. It now asserts that Piranha and the Harebrained Defendants unlawfully reproduced (rather than created derivative works of) its allegedly protected images. The Harebrained Defendants join Piranha's reply in support of the Motion, and further submit this short reply to explain why Harmony Gold's new theory of infringement, as to its claim against the Harebrained Defendants, cannot survive summary judgment.

**I. INTRODUCTION**

Since the inception of this case, Harmony Gold accused the Harebrained Defendants of infringing three of its copyright-protected images (the "Original Images") by creating

1 unauthorized derivative works of those images. *See* Dkt. 47 (Mot.) at 7. In the course of  
 2 discovery, however, Defendants uncovered a 2003 agreement between Harmony Gold and its  
 3 licensor, Tatsuoko, which unequivocally withheld from Harmony Gold the right to create (or  
 4 license the creation of) derivative works of the Original Images. *Id.* at 5. When confronted with  
 5 this fatal flaw, Harmony Gold changed its story and now says it never intended to allege  
 6 infringement based on the creation of derivative works. Instead, Harmony Gold says, this  
 7 lawsuit seeks to enforce Harmony Gold’s rights to reproduce and display<sup>1</sup> the Original Images.  
 8 *See* Dkt. 61 (Opp’n) at 3. Harmony Gold seeks leave to amend its complaint to “further  
 9 clarify”<sup>2</sup> the rights it seeks to enforce. *Id.*

10 Nonsense.

11 Harmony Gold, a confessed serial litigant, *see* Opp’n at 2, got caught making a claim it  
 12 had no right to make. It tried to assert an infringement claim against Defendants based on the  
 13 supposed creation of derivative works. Defendants discovered Harmony Gold had no authority  
 14 to bring such a claim, and compelled Harmony Gold to admit as much. Opp’n at 8-9. In a last-  
 15 ditch effort to keep this litigation alive, Harmony Gold now wants to assert a claim for **direct**  
 16 infringement based on unauthorized reproduction and display of the Original Images.

17 Disregard (for the moment) Harmony Gold’s questionable conduct in asserting a  
 18 derivative-work infringement claim it has known for the past fourteen years it did not possess.  
 19 Even if Harmony Gold could assert an infringement claim based on the Harebrained  
 20 Defendants’ purported reproduction of the Original Images (a dubious prospect), that theory of  
 21 liability cannot survive summary judgment either. No reasonable juror could compare the  
 22 Original Images with the Harebrained Defendants’ purportedly infringing images (the “Accused  
 23 Images”) and find substantial similarity between them. Harmony Gold’s untimely effort to  
 24 argue around its own Complaint is futile, and on that basis, the Court should grant summary  
 25 judgment on Harmony Gold’s copyright infringement claim.

26 <sup>1</sup> The rights to reproduce and display are a different set of exclusive rights protected under the Copyright Act, 17  
 27 U.S.C. § 106

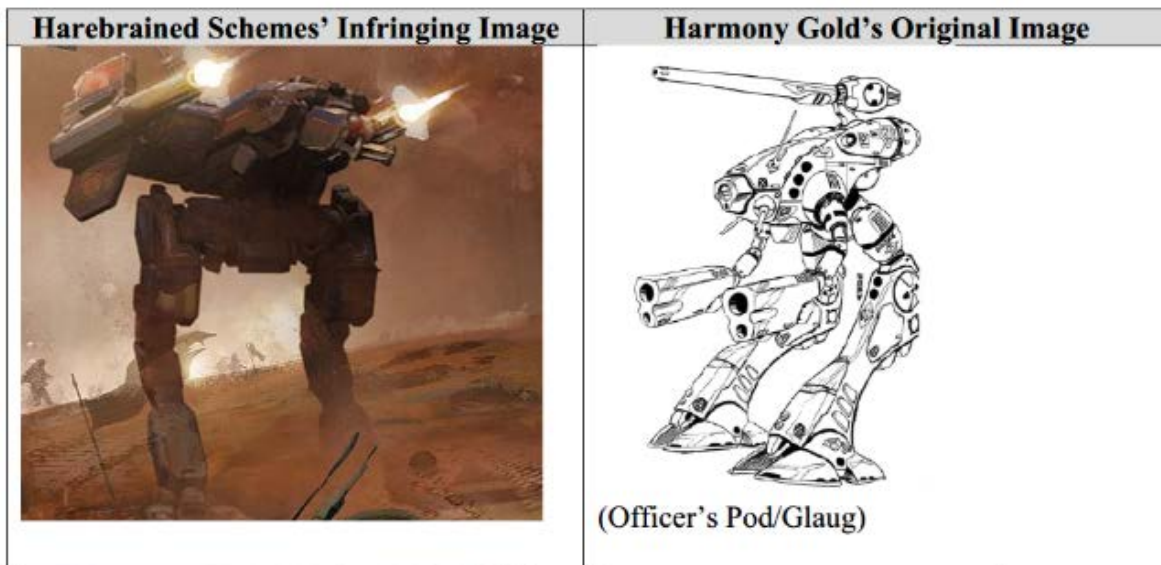
<sup>2</sup> “Further clarify,” it seems, is an understated way of saying “make a 180-degree change.”

## II. ARGUMENT

To prevail on its claim for infringement, Harmony Gold must prove “(1) ownership of a valid copyright, and (2) copying of constituent elements of the work that are original.” *Funky Films, Inc. v. Time Warner Entm’t Co., L.P.*, 462 F.3d 1072, 1076 (9th Cir. 2006). To establish the second element, absent proof of direct copying, Harmony Gold must show the Harebrained Defendants “had access to the plaintiff’s work and that the two works are substantially similar.” *Id.* Substantial similarity is a fact-specific inquiry, but it “may often be decided as a matter of law.” *Benay v. Warner Bros. Entm’t, Inc.*, 607 F.3d 620, 624. “When the issue is whether two works are substantially similar, summary judgment is appropriate if no reasonable juror could find substantial similarity of ideas and expression.” *Funky Films*, 462 F.3d at 1076 (internal quotation marks omitted). The Ninth Circuit has “frequently affirmed summary judgment in favor of copyright defendants on the issue of substantial similarity.” *Id.* at 1077.

Harmony Gold accuses the Harebrained Defendants of infringing three Original Images. In its opposition, for the first time, it suggests the Harebrained Defendants reproduced (rather than created derivative works of) those three images. But even if Harmony Gold could amend its Complaint through its opposition brief, this new argument is futile: no rational juror could possibly find the Accused Images to be substantially similar to the Original Images.

Consider the first Accused Image, and the Original Image it purportedly infringes:

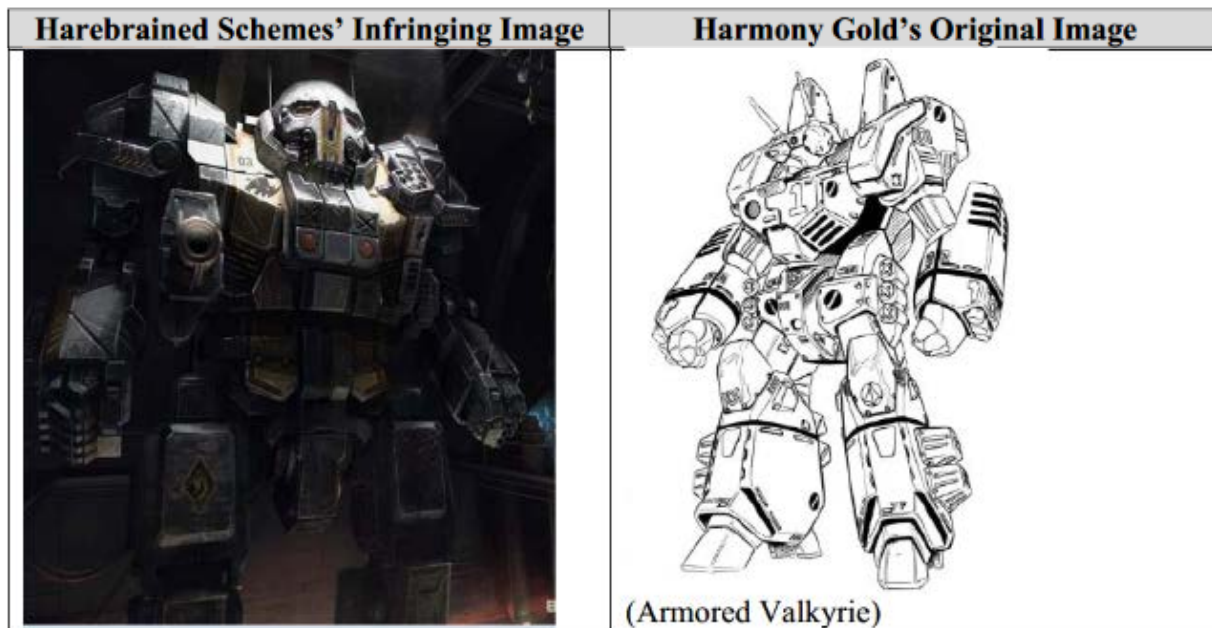


Dkt. 31 (Am. Compl.) ¶ 28.

The Harebrained Defendants recognize that “mechs” (or giant warrior robots) may not be everyone’s cup of tea. But no deep appreciation of the genre is necessary to see that these two images bear *no* similarity whatsoever—except in the sense that they are both giant warrior robots, a science-fiction concept that Harmony Gold cannot (and does not) claim to be the subject of any exclusive copyright.<sup>3</sup> First, there is the obvious: the Original Image is a black-and-white line drawing, and the Accused Image is a full-color, 3D-rendered mech with a scenic background. Second, the actual mechs themselves look nothing alike. Every single feature is different: the feet, the legs, the hip joint, the abdomen, the arms and their placement, the types of weapons and their placements, the head... the list goes on. Every single distinctive element of these two images is different.

As Sesame Street so aptly puts it, “one of these things is not like the other.”<sup>4</sup>

Harmony Gold’s claim fares no better with its second instance of purported infringement:



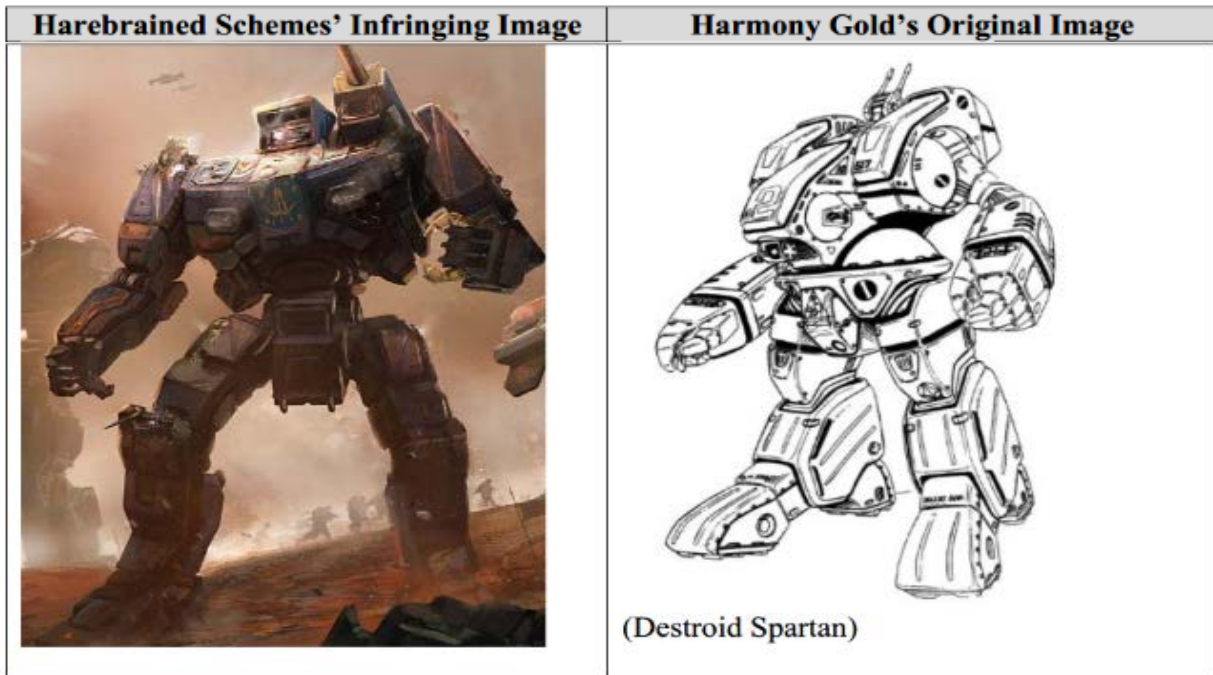
<sup>3</sup> For an discussion of the early history of mechs (or “mecha,” as they are referred to in Japan), which can be traced back to the 1880 Jules Verne novel *La Maison à vapeur*, see <https://en.wikipedia.org/wiki/Mecha>.

<sup>4</sup> “One of These Things,” a song written by Joe Raposo, Jon Stone, and Bruce Hart, was regularly used on Sesame Street in a number of episodes. See [http://muppet.wikia.com/wiki/One\\_of\\_These\\_Things](http://muppet.wikia.com/wiki/One_of_These_Things).

1 *Id.*

2 Again, these two images look nothing alike. Every one of the distinctive anatomical  
3 features—the legs, thighs, hips, groin, arms, chest, shoulders, and head—is different. Indeed, it  
4 is a challenge to find *any* design element in common between these two images.

5 The last image pair is equally as baffling:



17 *Id.*

18 Again, every distinctive anatomical feature is dissimilar. Every design aspect of the  
19 mech in the Original Image that makes it a unique creation is completely different or missing  
20 altogether from the mech in the Accused Image.

21 In short, there is simply no factual basis from which a rational juror could find  
22 substantial similarity between these three sets of images. Thus, even if the Court were inclined  
23 to permit Harmony Gold to change its theory of infringement—at the eleventh hour in  
24 opposition to a summary judgment motion—that change would be futile. The most Harmony  
25 Gold could *ever* claim is that the Harebrained Defendants' robots are somehow “based on”  
26 Harmony Gold's robots (although the evidence above does not support that premise), and that  
27 the Harebrained Defendants copied certain characteristics of the latter while adapting them for a

1 completely different medium (from motion pictures to videogames). Even accepting that  
 2 unsubstantiated contention as true for purposes of summary judgment (although it is not), it  
 3 would, at best, create a disputed issue of fact about whether the Harebrained Defendants'  
 4 accused images are derivative works. But, as Harmony Gold admits, it has no right to bring a  
 5 claim for infringement based on derivative works.

### 6 III. CONCLUSION

7 Had Harmony Gold actually possessed the right to pursue its derivative-work  
 8 infringement claim, the Harebrained Defendants would have proven—at summary judgment or  
 9 at trial if necessary—that the Accused Images were not derived from (much less copied from)  
 10 the Original Images, and that Piranha and the Harebrained Defendants developed them  
 11 independently and from entirely different source material. Harmony Gold appears to now  
 12 concede, as it must, that it is not asserting a derivative-work claim (a claim it had no right to  
 13 bring in the first place).

14 If Harmony Gold is granted leave to assert a new direct infringement claim based on  
 15 unauthorized reproduction, that claim necessarily fails as a matter of law. Harmony Gold cannot  
 16 demonstrate that the Accused Images are substantially similar to the Original Images, and no  
 17 rational juror could so find. For that reason, and for all of the reasons articulated by Piranha  
 18 Games in its briefing, the Harebrained Defendants respectfully ask the Court to enter summary  
 19 judgment and dismiss Harmony Gold's copyright infringement claim.

20 DATED: December 22, 2017.

21 DAVIS WRIGHT TREMAINE LLP  
 22 *Attorneys for the Harebrained Defendants*

23 By /s/ James Harlan Corning  
 24 Warren J. Rheume, WSBA #13627  
 25 James Harlan Corning, WSBA #45177  
 26 1201 Third Avenue, Suite 2200  
 27 Seattle, WA 98101-3045  
 Phone: (206) 622-3150  
 Fax: (206) 757-7700  
 Email: warrenrheume@dwt.com  
 jamescorning@dwt.com

**CERTIFICATE OF SERVICE**

I hereby declare under penalty of perjury under the laws of the state of Washington that the foregoing document was filed with the Clerk of the Court using the CM/ECF system, which will effect service of the document on all counsel of record in this matter.

*s/ James Harlan Corning*

James Harlan Corning